



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 30, 2009

Mr. Trent B. Krienke
Davis & Wilkerson, P.C.
P.O. Box 2283
Austin, Texas 78768-2283

OR2009-18454

Dear Mr. Krienke:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 365879.

The Gainesville Hospital District d/b/a North Texas Medical Center ("NTMC"), which you represent, received a request for (1) a specified individual's emails, (2) the calendars and all calendar entries of three named individuals, (3) all emails sent to multiple employees by a specified department, (4) specified documents related to the requestor, (5) any attorney billing statements received by NTMC since a previous request, (6) all emails exchanged between NTMC and/ or its board members with a named individual during a specified time period, (7) all emails exchanged between NTMC attorneys and a named individual that were not marked as being under the attorney client privilege, (8) the public information sign on display at NTMC, and (9) itemized expense reports or credit card statements.¹ You state that NTMC has made the information responsive to parts three, eight, and nine of the request available to the requestor. You contend that other responsive information is not subject to disclosure under the Act. You also claim that other responsive information is excepted from disclosure under sections 552.101, 552.107, 552.111, and 552.136 of the Government Code

¹ You inform us that NTMC sought and received clarification of this request for information. *See* Gov't Code § 552.222(b) (governmental body may communicate with requestor for purpose of clarifying or narrowing request for information); Open Records Decision No. 663 at 2-5 (1999) (addressing circumstances under which governmental body's communications with requestor to clarify or narrow request will toll ten-business-day deadline to request decision under section 552.301(b)).

and privileged under Texas Rule of Evidence 503.² We have considered the exceptions you claim and reviewed the information you submitted. We also have considered the comments that we received from the requestor. *See* Gov't Code § 552.304 (any person may submit written comments stating why information at issue in request for attorney general decision should or should not be released).

First, we address your contention that some of the requested information is not public information subject to the Act. The Act is applicable only to "public information." *See* Gov't Code §§ 552.002, .021. Section 552.002(a) provides that "public information" consists of

information that is collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business:

- (1) by a governmental body; or
- (2) for a governmental body and the governmental body owns the information or has a right of access to it.

Id. § 552.002(a). Thus, virtually all of the information in a governmental body's physical possession constitutes public information and thus is subject to the Act. *Id.* § 552.002(a)(1); *see* Open Records Decision Nos. 549 at 4 (1990), 514 at 1-2 (1988). You contend that the personal emails and computer usernames and passwords you have marked in Exhibit F were not "collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business' by or for [NTMC.]" Based on your representations and our review of the submitted information, we conclude that the information we have marked in Exhibit F does not constitute public information for the purposes of section 552.002. *See* Open Records Decision No. 635 at 4 (1995) (section 552.002 not applicable to personal information unrelated to official business and created or maintained by state employee involving de minimis use of state resources); *see also* Open Records Decision No. 581 (1990) (certain computer information, such as source codes, documentation information, and other computer programming, that has no significance other than its use as a tool for the maintenance, manipulation, or protection of public property, is not the kind of information that is made public under section 552.021 of the Act). Therefore, the information we have marked in Exhibit F is not subject to the Act, and NTMC need not release that information in response to this request.

² Although you raise Texas Rule of Evidence 503 for the information in Exhibit J, the submitted information in Exhibit J is not subject to section 552.022, thus section 552.107 is the proper exception to raise when asserting the attorney-client privilege for information not subject to section 552.022. *See* Open Records Decision No. 676 (2002).

You also state that the calendar entries in Exhibits G-1, G-2, G-3, and G-4 were not collected, assembled, or maintained by NTMC in connection with the transaction of official business. In Open Records Decision No. 635, this office found that information in a public official's personal appointment calendar may be subject to the Act in certain instances. See ORD 635 at 6-8 (stating information maintained on a privately-owned medium and actually used in connection with the transaction of official business would be subject to the Act). We note that the Act's definition of "public information" does not require that an employee or official create the information at the direction of the governmental body. See Gov't Code § 552.002. Based on our review, we find some of the calendar entries in Exhibits G-1, G-2, G-3, and G-4 were not collected, assembled, or maintained under a law or ordinance or in connection with the transaction of official business. Thus, the calendar entries we have marked are not subject to the Act and need not be released. However, the remaining information in Exhibits F and G was collected or assembled or is maintained in connection with the transaction of official NTMC business and, thus, constitutes "public information" as defined by section 552.002(a). Because this information is subject to the Act, it must be released unless it falls within the scope of an exception to disclosure. See Gov't Code §§ 552.301, .302

You also argue that some of the information in Exhibit F is protected by section 552.101 of the Government Code. Section 552.101 of the Government Code encompasses the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). The type of information considered intimate or embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. *Id.* at 683.

This office has found that personal financial information not relating to a financial transaction between an individual and a governmental body is generally protected by common-law privacy. See Open Records Decision Nos. 600 (1992) (employee's designation of retirement beneficiary, choice of insurance carrier, election of optional coverages, direct deposit authorization, forms allowing employee to allocate pretax compensation to group insurance, health care or dependent care), 545 (1990) (deferred compensation information, participation in voluntary investment program, election of optional insurance coverage, mortgage payments, assets, bills, and credit history). Based on your representations and our review, we find NTMC must withhold the information we have marked in Exhibit F under section 552.101 of the Government Code in conjunction with common-law privacy. However, none of the remaining information in Exhibit F is highly intimate or embarrassing information of no legitimate public concern. Thus, it may not be withheld under section 552.101 in conjunction with common-law privacy.

Section 552.111 of the Government Code excepts from disclosure “an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency.” Gov’t Code § 552.111. This exception encompasses the deliberative process privilege. See Open Records Decision No. 615 at 2 (1993). The purpose of section 552.111 is to protect advice, recommendations, and opinions in the decisional process and to encourage open and frank discussion in the deliberative process. See *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.—San Antonio 1982, no writ); Open Records Decision No. 538 at 1-2 (1990). In Open Records Decision No. 615, this office re-examined the statutory predecessor to section 552.111 in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.—Austin 1992, no writ). We determined that section 552.111 excepts from disclosure only those internal communications that consist of advice, recommendations, and opinions that reflect the policymaking processes of the governmental body. See ORD 615 at 5. A governmental body’s policymaking functions do not encompass routine internal administrative or personnel matters, and disclosure of information about such matters will not inhibit free discussion of policy issues among agency personnel. *Id.*; see also *City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000) (section 552.111 not applicable to personnel-related communications that did not involve policymaking). Moreover, section 552.111 does not protect facts and written observations of facts and events that are severable from advice, opinions, and recommendations. See ORD 615 at 5. But if factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make severance of the factual data impractical, the factual information also may be withheld under section 552.111. See Open Records Decision No. 313 at 3 (1982).

You assert that some of the emails in Exhibit F, as well as the information in Exhibit I are excepted from disclosure under section 552.111. Based on our review, we have marked the information in Exhibit I that may be withheld under section 552.111 of the Government Code. However, we find that the remaining information in Exhibits F and I is primarily factual and pertains to routine administrative issues that do not rise to the level of policymaking. Accordingly, the remaining information in Exhibits F and I may not be withheld under section 552.111.

You assert that the submitted information in Exhibit J is excepted from disclosure under the attorney-client privilege. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body has the burden of providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *Id.* at 7. Second, the communication must have been made “for the purpose of facilitating the rendition of professional legal services” to the client governmental body. TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client

governmental body. *In re Tex. Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element. Third, the privilege applies only to communications between or among clients, client representatives, lawyers, lawyer representatives, and lawyers representing another party in a pending action concerning a matter of common interest therein. TEX. R. EVID. 503(b)(1)(A)-(E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *id.* 503(b)(1), meaning it was “not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.” *Id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no pet.). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

You assert that the information in Exhibit J is subject to the attorney-client privilege. You contend that the information in Exhibit J consists of confidential communications between NTMC’s attorneys and NTMC’s Board of Directors that were made in furtherance of the rendition of professional legal services to NTMC. You identify the parties involved in the communications and indicate that these communications have remained confidential and have not been revealed to any third party. Upon review of the submitted information, we agree that the information we have marked in Exhibit J is excepted from disclosure under section 552.107 and may be withheld. However, based on our review, the remaining information in Exhibit J has been revealed to a non-privileged third party and, thus, may not be withheld under section 552.107.

You assert that portions of the submitted information in Exhibit H are excepted from disclosure under rule 503 of the Texas Rules of Evidence. As you acknowledge, the submitted information in Exhibit H consists of attorney fee bills which are subject to section 552.022(a)(16) of the Government Code. Section 552.022(a)(16) provides that information in a bill for attorney’s fees must be released unless it is privileged under the attorney-client privilege or is expressly confidential under other law. *See Gov’t Code* § 552.022(a)(16). The Texas Supreme Court has held that the Texas Rules of Evidence and the Texas Rules of Civil Procedure are “other law” within the meaning of section 552.022. *See In re City of*

Georgetown, 53 S.W.3d 328, 336 (Tex. 2001). Accordingly, we will consider your assertion of the attorney-client privilege under Texas Rule of Evidence 503. Texas Rule of Evidence 503 provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

(A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(B) between the lawyer and the lawyer's representative;

(C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(D) between representatives of the client or between the client and a representative of the client; or

(E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *Id.* 503(a)(5). Thus, in order to withhold attorney-client privileged information from disclosure under rule 503, a governmental body must: (1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; (2) identify the parties involved in the communication; and (3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the information is privileged and confidential under rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.—Houston [14th Dist.] 1993, no writ).

You state that portions of the submitted attorney fee bills document communications between NTMC's attorneys and NTMC employees with authority to obtain legal advice that were made in connection with the rendition of professional legal services to NTMC. You identify

the parties involved in the communications and indicate that these communications have remained confidential and have not been revealed to any third party. Upon review of the submitted information, we agree that the information you have marked in Exhibit H is protected by the attorney-client privilege and may be withheld from disclosure.

You also raise section 552.136 of the Government Code, which states “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136. Accordingly, NTMC must withhold the credit card number we have marked in Exhibit F under section 552.136 of the Government Code.³

We note that portions of the submitted information are subject to sections 552.117(a)(1) and 552.137 of the Government Code.⁴ Section 552.117(a)(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who request that this information be kept confidential under section 552.024 of the Government Code. Whether a particular piece of information is protected by section 552.117(a)(1) must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). We have marked the information that must be withheld under section 552.117(a)(1) if that section applies. Pursuant to section 552.117(a)(1), if the employee at issue made a timely election to keep her information confidential, NTMC must withhold the information we have marked. However, if the employee did not make a timely election to keep her information confidential, then it must be released to the requestor.

Section 552.137 of the Government Code excepts from disclosure “an e-mail address of a member of the public that is provided for the purpose of communicating electronically with a governmental body” unless the member of the public consents to its release or the e-mail address is of a type specifically excluded by subsection (c). *See* Gov’t Code § 552.137(a)-(c). The e-mail address we have marked is not a type specifically excluded by section 552.137(c). Thus, unless NTMC receives consent for its release, NTMC must withhold the e-mail address we have marked pursuant to section 552.137.⁵ *See id.* § 552.137(b).

³We note this office recently issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold credit card numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

⁴The Office of the Attorney General will raise mandatory exceptions like sections 552.117 and 552.137 on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

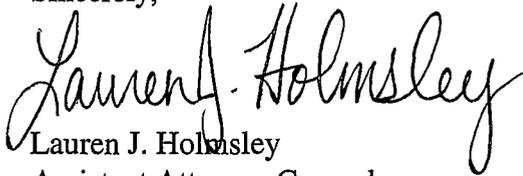
⁵In ORD 684, this office authorized governmental bodies to withhold email addresses of a member of the public under section 552.137 of the Government Code, without the necessity of requesting an attorney general decision.

In summary, NTMC need not release the marked information that is not subject to the Act. NTMC must withhold the information we have marked under section 552.101 in conjunction with common-law privacy. NTMC may withhold the information we have marked in Exhibit I under section 552.111 of the Government Code. NTMC may also withhold the information we have marked in Exhibit J under section 552.107 of the Government Code. NTMC may withhold the information it has marked in Exhibit H under rule 503 of the Texas Rules of Evidence. NTMC must withhold the partial credit card information we have marked under section 552.136. NTMC must withhold the information we have marked under section 552.117(a)(1) to the extent the employee concerned timely elected under section 552.024 to keep her information confidential. Unless NTMC receives consent from the owner of the marked e-mail address to release this information, NTMC must withhold the e-mail address we have marked under section 552.137. The remaining information must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.oag.state.tx.us/open/index_orl.php, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free at (888) 672-6787.

Sincerely,



Lauren J. Holmsley
Assistant Attorney General
Open Records Division

LJH/sdk

Ref: ID# 365879

Enc. Submitted documents

c: Requestor
(w/o enclosures)